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No.

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In The Supreme Court

OF THE

United States

OCTOBER TERM, 1990

VENTILATOREN STORK HENGELO B.V.,
VERENIGDE MACHINEFABRIEKEN STORK N.V.,
Petitioners,

VS.

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the bar on appellate consideration of remand orders contained in 28 U.S.C. § 1447(d) is applicable where:

(a) the district court first determined the substantive issue of whether the parties were bound by an arbitration agreement in a case which was removed from state court pursuant to 9 U.S.C. § 205 (authorizing removal where the matter at issue relates to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards);

(b) the effect of the district court's order was to deny an application to compel arbitration, the appealability of which is expressly and specifically authorized by 9 U.S.C. § 15;

(c) the district court's decision directing remand was preceded "in logic and in fact" by its determination of the arbitrability of the controversy (*Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1935));

(d) it is inconsistent with this Court's interpretation of the important nature of the right to arbitration; and

(e) several Circuit Courts have recognized an exception to the bar in cases involving forum selection clauses and, at least one other Circuit Court has also recognized an exception where removal was pursuant to a special removal statute such as 9 U.S.C. § 205.

2. Whether the appellate courts should discourage litigants from appealing district court orders which effectively deny the right to arbitration by imposing sanctions under Rule 38 of the Federal Rules of Appellate Procedure.

PARTIES TO THE PROCEEDING

The names of the parties to this proceeding are all listed in the caption of the case. Verenigde Machinefabrieken Stork N.V. ("Machinefabrieken") is the parent company of Ventilatoren Stork Hengelo B.V. ("Ventilatoren"). The nonwholly-owned subsidiaries of Machinefabrieken include Stovec Industries, Stork Torbed, Bombas Stork, Cochrane Stork Zimbabwe, Stork Pumps India, Stork Pumps Kenya, Stork-Wärtsilä Diesel, Stork Boilers, Delaval Stork, Stork Colorproofing, Storkdata, Ventilators Stork Howden, Carrosseriefabriek Hainje, Locamation, Peja Holding, Comprimo and Stork Filtration Systems.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ventilatoren Stork Hengelo B.V. ("Ventilatoren") and Verenigde Machinefabrieken Stork N.V. ("Machinefabrieken") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on April 30, 1990 and amended on June 25, 1990.

OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit, dated April 30, 1990, is presently unreported and is reprinted in the Appendix to this Petition ("Pet. App.") at p. 3a. The order of the United States Court of Appeals for the Ninth Circuit, dated June 25, 1990, which amends the memorandum decision and denies the petition for rehearing and suggestion for rehearing en banc is presently unreported and is reprinted in the Appendix to this Petition at p. 1a. The amended memorandum decision and memorandum decision of the United States District Court for the Eastern District of California are presently unreported and are reprinted in the Appendix to this Petition at p. 10a and p. 14a.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals filed its memorandum decision on April 30, 1990. On June 25, 1990, in response to the petition for rehearing filed by Ventilatoren and Machinefabrieken, the Court of Appeals filed an order which amended its memorandum decision and denied the petition for rehearing and suggestion for rehearing en banc.

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions which are set forth in the Appendix to this Petition: 9 U.S.C. § 15, 9 U.S.C. § 201, 9 U.S.C. § 202, 9 U.S.C. § 203, 9 U.S.C. § 204, 9 U.S.C. § 205, 9 U.S.C. § 206, 9 U.S.C. § 207, 9 U.S.C. § 208, 28 U.S.C. § 1441, 28 U.S.C. § 1447, Fed. R. App. P. 38.

STATEMENT OF THE CASE

Factual Background

Ventilatoren Stork Hengelo B.V. ("Ventilatoren"), a Dutch company, sold windmill blades to Nordtank, a Danish windmill manufacturer, pursuant to a written supply contract which contained a clause requiring International Chamber of Commerce arbitration.[1] Nordtank, in turn, sold completed windmills to Cannon, a United States developer of windparks. Nordtank and Cannon obtained warranty insurance from respondent Forsikringsaktieselskabet Hafnia ("Hafnia"), the plaintiff in the present lawsuit. With this lawsuit, Hafnia, as a subrogee, filed suit against Ventilatoren and its parent company, Verenigde Machinefabrieken Stork N.V. ("Machinefabrieken").[2]

Since Hafnia was pursuing commercial remedies derived from Ventilatoren's contractual sale of the windmill blades to Nordtank, there was a reasonable expectation that Hafnia's remedies would be limited by the original

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[1]Ventilatoren's supply contract for the windmill blades stated that "[a]ny dispute arising out of the Contract shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules."

[2]In this lawsuit, Hafnia has taken the position that it is pursuing the rights of Cannon even though Cannon's alleged rights all derive from Ventilatoren's original sale of the windmill blades to Nordtank, the windmill manufacturer. In fact, Hafnia is attempting to enforce the five-year express warranty that was contained in the Ventilatoren supply contract (which also contained the International Chamber of Commerce arbitration clause).

supply contract — including the arbitration provision.[3] Consequently, Ventilatoren and Machinefabrieken removed the case to the United States District Court for the Eastern District of California pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). 9 U.S.C. § 201, *et seq.* Section 205 of the Convention provides that:

> "[w]here the subject matter of an action or proceeding pending in a state court *relates to* an arbitration agreement . . . falling under the Convention, the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States . . . "

9 U.S.C. § 205 (emphasis added).[4]

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[3]*See Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 204 (3d Cir. 1983), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 315 (1983) (purchaser from manufacturer was bound by forum selection clause in the supply contract between the manufacturer and the manufacturer of the component part); *Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp.*, 677 F.2d 771, 773 (9th Cir. 1982) (component part manufacturer "had no greater liabilities" and purchaser "had no greater rights" than those specified in supply contract); *Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F.Supp. 579, 581 (N.D. Cal. 1985) (arbitration clause in component part manufacturer's contract was recognized).

[4]In a virtually identical case, Judge Pfaelzer of the United States District Court for the Central District of California ruled that the same arbitration agreement should be enforced against parties who were in essentially the same position as Hafnia. (*Difwind Farms Limited VIII, et al. v. Ventilatoren Stork Hengelo B.V.*, United States District Court for the Central District of California, Case No. CV 88-5038 MRP, *appeal dismissed*, United States Court of Appeals for the Ninth Circuit, No. 89-55145, June 14, 1989.) *Difwind* involved the exact same arbitration provision (i.e., from the Ventilatoren supply contract) that is at issue in the present case.

District Court

At the time of removal, Ventilatoren and Machinefabrieken filed a motion to compel arbitration pursuant to 9 U.S.C. § 206. Hafnia responded to the removal and the motion to compel arbitration by filing a motion to remand based upon its argument that it should not be bound by the arbitration agreement in Ventilatoren's supply contract.

The district court held that Hafnia was not bound. However, it did not specifically address the question of whether Ventilatoren and Machinefabrieken had properly removed this case to federal court pursuant to 9 U.S.C. § 205, nor did it decide the question of whether the present case "relates to" an arbitration agreement covered by the Convention.[5] After deciding that Hafnia was not bound to arbitrate the dispute, the district court remanded the case to state court.[6] The district court did not state whether it was issuing its remand order

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[5]Ventilatoren and Machinefabrieken also filed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss based on forum non conveniens. The district court did not reach the merits of those motions because of its resolution of the arbitration issue.

[6]The district court's analysis was exclusively concerned with the arbitrability of Hafnia's claims:

> "Since no arbitration award has been entered in this matter, the Court turns its attention as to whether there is a contract that requires the parties before the Court to engage in arbitration.
>
> The transaction that gave rise to this dispute was the condition of the completed windmills purchased by Cannon from Nordtank. However, it is undisputed that Cannon was not a signatory to the Stork B.V./Nordtank supply contract . . . "

A copy of the district court's Amended Memorandum, filed January 4, 1989, is included in the Appendix to this Petition at p. 10a.

pursuant to 28 U.S.C. § 1447(c) or any other statutory provision.

Court Of Appeals

Ventilatoren and Machinefabrieken sought appellate review of the district court's ruling on the substantive contract question — that is, whether Hafnia should be bound by the arbitration clause. Hafnia then filed a motion to dismiss arguing that 28 U.S.C. § 1447(d) should bar the appeal because the arbitration question had been decided as part of the district court's ruling on the remand motion. In response, Ventilatoren and Machinefabrieken argued, among other things, that 28 U.S.C. § 1447(d) should not apply based upon this Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1935), as well as the Ninth Circuit's own decisions in *Clorox Co. v. United States District Court*, 779 F.2d 517 (9th Cir. 1985), and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), which recognized limitations on the appealability bar of Section 1447(d). After Hafnia's motion to dismiss the appeal was fully briefed, a three judge panel of the Ninth Circuit entered an order consolidating Hafnia's jurisdictional challenge with the appeal on the merits.[7]

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[7]The motions panel, which consisted of Judges Wallace, Alarcon and Norris, entered an order which provided, in pertinent part, as follows:

> "The motion to dismiss the appeal and all related memoranda are referred for disposition to the panel that will consider this appeal on the merits."

A copy of the Ninth Circuit's order, filed April 11, 1989, is included in the Appendix to this Petition at p. 9a.

On March 14, 1990, a panel of the Ninth Circuit consisting of Judges Boochever, Wiggins and Noonan, heard argument in the present case. On April 30, 1990, the panel issued an opinion in which it held that the arbitration question was shielded from appellate review because it had been decided in the context of a remand order.[8] Consequently, the panel never reached the substantive contract question which was the basis for the appeal — that is, was Hafnia bound by the arbitration clause. The panel also found that one of the arguments in support of appellate jurisdiction was "wholly without merit" and awarded sanctions against Ventilatoren and Machinefabrieken under Rule 38 of the Federal Rules of Appellate Procedure. In response to a petition for rehearing, the panel amended its memorandum on June 25, 1990, by deleting the last paragraph of the decision which had contained a suggestion of misconduct and by adding two new sentences suggesting that sanctions were somehow appropriate because Ventilatoren and Machinefabrieken could have withdrawn their appeal rather than have a court decide the jurisdictional question.[9]

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[8] A copy of the Ninth Circuit's Memorandum Decison, filed April 30, 1990, is included in the Appendix to this Petition at p. 3a.

[9] A copy of the Ninth Circuit's order, filed June 25, 1990, is included in the Appendix to this Petition at p. 1a.

REASONS FOR GRANTING THE WRIT

I.

A WRIT SHOULD BE ISSUED TO PERMIT THE APPEAL OF THE DISTRICT COURT'S DECISION ON THE ARBITRATION QUESTION

A. The Ninth Circuit's Ruling Conflicts With Congressional Efforts To Allow For The Immediate Appeal Of Orders Denying Applications To Compel Arbitration

By adopting the Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Congress has expressed a clear preference for arbitration. Moreover, Congress has also expressed a clear preference for the immediate appeal of district court decisions which refuse to recognize the right to arbitration. In 1988, Congress adopted a new statute which authorizes the immediate appeal of rulings which refuse to compel arbitration — 9 U.S.C. § 15.[10]

The Ninth Circuit refused to even consider the impact of 9 U.S.C. § 15 on this appeal. This recently-enacted statute authorizes the immediate appeal of orders denying applications to compel arbitration under either 9 U.S.C. § 4 or 9 U.S.C. § 206. The legislative history of Section 15 suggests that Congress favors the immediate appeal of decisions favoring litigation over arbitration. As the House Report explained:

> "Section 207 amends Title 9, United States Code, in order to improve the appellate process in the Federal courts with respect to arbitration. It adds a new

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[10]Section 15 on "Appeals" was added as part of the 1988 Judicial Improvements and Access to Justice Act, Pub. L. 100-702, Title X. § 1019(a), November 19, 1988, 102 Stat. 4671.

> section 15 to chapter 1 of title 9. In that section, interlocutory appeals are provided for when a trial court rejects a contention that a dispute is arbitrable under an agreement of the parties and instead requires the parties to litigate."

House Report (Judiciary Committee) No. 100-889, 100th Congress, 2d Session, pp. 36-37 (Aug. 26, 1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 5997.[11]

Section 15 specifically authorizes the immediate appeal from orders "denying an application under Section 206 of this title to compel arbitration." In the present case, Ventilatoren and Machinefabrieken filed their motion to compel arbitration under Section 206. The district court decided that Hafnia was not bound by the arbitration clause in its remand order even though it did not expressly address the motion to compel. Nevertheless, by resolving the substantive contractual issue of whether Hafnia must honor the arbitration clause, the clear effect of the remand order was to deny the motion to compel. Thus, the district court's decision should be reviewable pursuant to 9 U.S.C. § 15.

This appeal poses a classic case of conflict between a general statute, 28 U.S.C. § 1447(d), and a recently-enacted, more specific statute, 9 U.S.C. § 15. Under well-

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[11]The Senate Report also expressed a policy in favor of the appealability of orders denying arbitration:

> "Subsection (a) of the proposal, in effect, permits an appeal where the effect of the court order favors litigation over arbitration — e.g., refusal to stay judicial action on issue referable to arbitration, denial of an application to compel arbitration, *et seq.* — or where a final decision with respect to the arbitration is involved."

134 Congressional Record S16284, S16309 (daily ed. Oct. 14, 1988).

established principles of statutory construction, Section 15 should control. As this Court explained in *Fourco Glass Co. v. Transmitra Product Corp.*, 353 U.S. 222, 228-229, 77 S.Ct. 787, 1 L.Ed.2d 786 (1957), "specific terms prevail over the general in the same or another statute which might be controlling".[12] The Ninth Circuit's decision conflicts with the specific statute — 9 U.S.C. § 15 — which authorizes the immediate appeals of refusals to compel arbitration.

B. The Ninth Circuit's Ruling Conflicts With This Court's Interpretation Of 28 U.S.C. § 1447(d)

The Ninth Circuit's application of the jurisdictional bar of 28 U.S.C. § 1447(d) is inconsistent with this Court's prior decisions which have interpreted that statute and its predecessors. For example, after reviewing the legislative history of 28 U.S.C. § 1447(d) in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 350, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), this Court found "no indication whatsoever that Congress intended to extend the prohibition against review to reach remand orders entered on grounds not provided by statute."

In fact, the Ninth Circuit's decision in the present case conflicts with this Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1935). In *Waco,* this Court held that a district court's dismissal of a defendant, which simultaneously led the district court to remand the action for lack

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[12] *See also Stewart v. Smith,* 673 F.2d 485, 492 (D.C. Cir. 1982) ("[w]hen one statute speaks in general terms while the other is specific, conflicting provisions may be reconciled by carving out an exception from the more general enactment for the more specific statute").

of subject matter jurisdiction, was reviewable on appeal. As this Court explained:

> "True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.
>
> We are of the opinion that the petitioner was entitled to have the Circuit Court of Appeals determine whether the dismissal of its cross-action against the Fidelity Company was proper."

Waco, 293 U.S. at 143.

In the present case, the district court's decision on the arbitration question "... preceded that of remand and was made by the District Court while it had control of the cause." *Waco,* 293 U.S. at 143. That is, the district court first decided that Hafnia was not bound by the arbitration clause contained in the supply contract for the windmill blades before deciding to remand. The resolution of this substantive contractual question should not be insulated from appellate review under 28 U.S.C. § 1447(d) simply because it was included as part of a remand decision.[13] The Ninth Circuit's decision conflicts with *Waco.*

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[13]There are numerous cases which have followed *Waco* and held that substantive issues affecting the merits of the dispute should not be shielded from appellate review. *See, e.g., Mitchell v. Carlson,* 896 F.2d 128, 132-133 (5th Cir. 1990) (under *Waco,* the order "in the present case is separable from the remand order and may be subject to review on appeal"); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273, 277 (9th Cir. 1984) (remand order was appealable, since "[t]o hold otherwise would deprive Budco of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions

C. The Ninth Circuit's Ruling Is Inconsistent With This Court's Interpretation Of The Right To Arbitration

This Court has consistently recognized the importance of federal policies promoting arbitration. The Ninth Circuit's inexplicable rejection of this well-established line of cases provides further support for issuance of the writ.

There is a strong presumption which favors the arbitration of commercial disputes such as the present matter. According to the Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), "[i]n enacting . . . the Federal [Arbitration] Act, Congress declared a national policy favoring arbitration. . . ." The presumption in favor of arbitration is even stronger in the international context. The concerns "of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes", requires that arbitration clauses be enforced even if "a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

In case after case, the Court has placed the importance of arbitration as a means of dispute resolution over barriers opponents have attempted to erect. In *Scherk v. Alberto-Culver*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), this Court held that an arbitration clause arising out of an international commercial transaction

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from review"); *Kozera v. Spirito*, 723 F.2d 1003, 1005 (1st Cir. 1983) (district court's remand order was appealable); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385, 1387 (11th Cir. 1982) (district court's order was appealable, notwithstanding that suit was subsequently remanded to state court).

should be "respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act." *Scherk*, 417 U.S. at 519-520. According to *Scherk*, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would . . . invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-517.[14]

In dismissing the present appeal, the Ninth Circuit ignored this Court's arbitration decisions. Removal based upon arbitration should not be considered in the same light as removal based upon diversity jurisdiction. An insurance company like Hafnia should not be able to circumvent an arbitration clause merely because it is proceeding as a subrogee. Given the importance of the right to arbitration, especially the right to arbitration in international commercial disputes, there should be an opportunity to have any ruling which denies that right subject to appellate review.[15] The Ninth Circuit's decision

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[14]In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), this Court ruled that "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration . . ." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25. *Mitsubishi Motors* held that the policy of promoting arbitration requires "national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Mitsubishi*, 473 U.S. at 639. The arbitration clause in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. ___, 109 S.Ct. 1917, 1920, 104 L.Ed.2d 526 (1989) was enforced, given "our current strong endorsement of the federal statutes favoring this method of resolving disputes."

[15]Unlike the Ninth Circuit's decision in the present case, the Fifth Circuit has held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the policies favoring international arbitration take precedence over a general rule barring

is inconsistent with this Court's interpretation of the importance of the right to arbitration.

D. The Ninth Circuit's Ruling Conflicts With Other Court Of Appeals' Decisions

The Ninth Circuit's decision conflicts with other federal appellate decisions. First, the decision conflicts with the fact that other Court of Appeals' decisions have recognized an exception to the appealability bar of 28 U.S.C. § 1447(d) when the remand was based upon the interpretation of a forum selection clause. Second, the Ninth Circuit's decision also conflicts with an Eleventh Circuit decision that held that 28 U.S.C. § 1447(d) did not have any application to cases which were removed pursuant to special removal statutes like 9 U.S.C. § 205.

Several appellate court decisions have specifically recognized a forum selection exception to Section 1447(d). For example, the Second Circuit recently explained that:

> "The rationale for Section 1447(d)'s nonreviewability rule is not implicated in the instant case. That rationale is 'to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues.' *Thermtron*, 423 U.S. at 351. This policy is not applicable when a district court with subject-

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appellate review of interlocutory decisions similar to 28 U.S.C. § 1447(d). *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140 (5th Cir. 1985). While *Sedco* addressed an admiralty rule, its reasoning applies to Section 1447(d):

> "The Convention was negotiated pursuant to the Constitution's treaty power. Congress then adopted enabling legislation to make the Convention the highest law of the land. As such the Convention must be enforced according to its terms over all prior inconsistent rules of law."

Sedco, 767 F.2d at 1145.

> matter jurisdiction remands a case on the basis of its interpretation of a forum-selection clause. If Section 1447(d) applied in such cases, a party would have no right to appeal from the determination of the validity and meaning of a contract. . . . We agree and hold that a remand order based on a district court's interpretation of a forum-selection clause is reviewable on appeal."

Karl Koch Erecting Co. v. New York Convention Center Development Corp., 838 F.2d 656, 658-659 (2d Cir. 1988). The Sixth Circuit and the Ninth Circuit (although not in the present case) have also recognized that certain forum selection questions that are decided in the context of remand orders should not be shielded from appellate review.[16]

The cases which have found a forum selection exception to 28 U.S.C. § 1447(d) should apply with equal force to

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[16]The Sixth Circuit recently explained that:

> "In [another case], we specifically addressed the appealability of a remand order predicated upon the interpretation of a forum selection clause, and we joined with those circuits which have held such orders appealable."

In Re Delta America Re Ins. Co., 900 F.2d 890, 892 (6th Cir. 1990). In *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985), the Ninth Circuit held that Section 1447(d) did not prevent the review of a remand order that had been based on a forum selection clause in an employee handbook. The Ninth Circuit also found that Section 1447(d) did not apply to a remand order that was based upon the interpretation of a forum selection clause in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984). *See also Regis Associates v. Rank Hotels, Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990) ("... a body of case law has developed holding that a remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction").

cases involving arbitration agreements. As this Court has explained, "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). Indeed, given the federal presumptions and policies favoring arbitration, any forum selection exception to 28 U.S.C. § 1447(d) should be broad enough to include arbitration agreements.

The Ninth Circuit's decision also conflicts with an Eleventh Circuit decision which held that 28 U.S.C. § 1447(d) only applies to those cases which were removed pursuant to 28 U.S.C. § 1441. *In re FSLIC*, 837 F.2d 432, 435 (11th Cir. 1988).[17] If the Eleventh Circuit's analysis were followed in the present case, there would have been appellate jurisdiction since the matter was originally removed from state court pursuant to 9 U.S.C. § 205, *not* 28 U.S.C. § 1441. Indeed, the language in 9 U.S.C. § 205 providing that "the procedure for removal otherwise provided by law shall apply" appears to be intended to incorporate by reference the provisions set forth in 28 U.S.C. § 1446 ("Procedure for removal"). By making no reference to the provisions of Section 1447 ("Procedure after removal generally"), 9 U.S.C. § 205 appears to implicitly exclude application of Section 1447(d). Such a reading of 9 U.S.C. § 205 would be wholly consistent with

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[17]The Ninth Circuit, in *FSLIC v. Frumenti Development*, 857 F.2d 665, 669 (9th Cir. 1988), rejected the argument that the bar of 28 U.S.C. § 1447(d) should be limited to those cases which were removed pursuant to 28 U.S.C. § 1441. The *Frumenti* court based its holding on its interpretation of *United States v. Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed 982 (1946), which applied the predecessor of 28 U.S.C. § 1447(d) to preclude the review of a remand order even though the case had not been removed pursuant to the predecessor of 28 U.S.C. § 1441.

the policy favoring international arbitration that is the very basis for removal under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

II.

A WRIT SHOULD BE ISSUED BECAUSE THE RULE 38 AWARD WILL DISCOURAGE ACCESS TO THE APPELLATE PROCESS

There was a substantial basis for the appeal that was taken in the present case.[18] Ventilatoren and Machinefabrieken had good arguments on the arbitration question.[19] Ventilatoren and Machinefabrieken also had

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[18]In *Difwind Farms Limited VIII, et al. v. Ventilatoren Stork Hengelo B.V.*, United States District Court for the Central District of California, Case No. CV 88-5038 MRP, *appeal dismissed*, United States Court of Appeals for the Ninth Circuit, No. 89-55145, June 14, 1989, the court recognized the binding nature of the arbitration clause involved in the present case and ordered the parties that were in Hafnia's position to " . . . arbitrate their disputes at the International Chamber of Commerce in accordance with the arbitration clause contained in the sales agreement between Ventilatoren Stork Hengelo B.V. and Nordtank A/S."

[19]Numerous cases have held that parties in this situation are bound by arbitration agreements. *See, e.g., Hughes Masonry v. Greater Clark County School Building*, 659 F.2d 836, 839 (7th Cir. 1981) (court held that "tort" claims were covered by the arbitration clause because a party " 'cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage' "); *In re Oil Spill by the "Amoco Cadiz", etc.*, 659 F.2d 789, 796 (7th Cir. 1981) (arbitration clause enforced because "[i]t would advance neither judicial economy nor the purposes of the federal arbitration act to permit International to assert in a judicial forum claims grounded upon its alleged relationship to Transport and to allow it to disavow the relationship for purposes of arbitration"); *Avila Group, Inc. v. Norma J. of California*, 426 F.Supp. 537, 542 (S.D.N.Y. 1977) (to

good arguments on the question of appellate jurisdiction. Application of Rule 38 sanctions in these circumstances would chill resort to the appellate courts.

The present case is similar to *Cooter & Gell v. Hartmarx Corp., et al.*, ____ U.S. ____, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), where this Court refused to extend Rule 11 in a manner that would have discouraged appeals:

> "Limiting Rule 11's scope in this matter accords with the policy of not discouraging meritorious appeals. If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged. The knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal."

Cooter & Gell, 110 S.Ct. at 2462.

In the present case, the Ninth Circuit apparently believed that Ventilatoren and Machinefabrieken should be punished for having taken an appeal from the district court's arbitration decision. The Ninth Circuit apparently believed that Ventilatoren and Machinefabrieken should have accepted the district court's erroneous conclusion on the arbitration question. The Ninth Circuit, however, ignores the fact that Ventilatoren and Machinefabrieken should be allowed to seek appellate review of a decision that might have the effect of denying their right to seek arbitration.

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allow a party "to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act").

Unless the Ninth Circuit intends to discourage access to the courts, there is no basis for its application of Rule 38 to the present case. Rule 38 should not be applied in such a cavalier manner. As Justice Stevens observed in a related context:

> "Freedom of access of the courts is a cherished value in our democratic society. . . . There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means. . . . [T]he strong presumption is against the imposition of sanctions for invoking the processes of the law." (footnotes omitted)

Talamini v. All-State Insurance Co., 470 U.S. 1067, 105 S.Ct. 1824, 1827-1828, 85 L.Ed.2d 125 (1985) (Stevens, J., joined by Brennan, Marshall and Blackmun, JJ., concurring).

The Ninth Circuit never reached the question of whether the arguments of error were "wholly without merit." Indeed, the Ninth Circuit never reached the substantive question which was at the heart of the appeal — that is, was Hafnia bound by the arbitration clause that was contained in the supply contract for the windmill blades. Instead, the Ninth Circuit found that one argument relating to appellate jurisdiction was "wholly without merit" and, on the basis of that one finding, awarded sanctions under Rule 38.

The panel's dislike of one argument is not sufficient support for a finding of frivolousness in the present case.

The result below was not obvious. If it had been, the Ninth Circuit panel which first considered Hafnia's motion to dismiss would have decided the question of appellate jurisdiction rather than deferring the question to the panel which considered the appeal on the merits. Moreover, if the result had been obvious, then the panel that decided the case could have refused to schedule oral argument pursuant to Fed. R. App. P. 34(a).

Allowing Rule 38 sanctions here would send a dramatic and unwarranted signal to the federal courts. This is not a case where there was any misconduct. This is not a case where there was any controlling authority directly on point.[20] In fact, this is a case where there was substantial support on the question of appellate jurisdiction. If Ventilatoren and Machinefabrieken are punished for attempting to protect their right to arbitration, other litigants will think twice before filing meritorious appeals. Access to the appellate court will be constricted. Such constriction is inconsistent with existing law, and this Court should consider this case to protect free access to our appellate courts.

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[20]There was nothing in any prior Ninth Circuit cases which would have suggested that there might be an absolute barrier to appellate jurisdiction. The Ninth Circuit decisions in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984) and *Clorox Co. v. United States District Court*, 779 F.2d 517 (9th Cir. 1985) supported appellate jurisdiction. The other case cited by the panel in the memorandum, *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989), did not control the question of appellate jurisdiction. *Hansen* did not discuss *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1935); *Hansen* did not address the right to arbitration; and, *Hansen* also did not involve a dispute over a forum selection clause.

CONCLUSION

A writ of certiorari should issue since the Ninth Circuit's decision conflicts with 9 U.S.C. § 15, this Court's decision in *Waco*, the important nature of the right to arbitration and other Circuit Court decisions addressing related issues. In addition, a writ should issue because the Ninth Circuit's sanction award under Fed. R. App. P. 38 was erroneous given the fact that there was substantial merit to the appeal, the court misinterpreted and misapplied the plain language of Rule 38 and the award will discourage access to the appellate process.

Respectfully Submitted,

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Dated: September 24, 1990.

APPENDIX

No. 88-15708

[FILED JUN. 25, 1990
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Plaintiff-Appellee,

v.

VENTILATOREN STORK HENGELO, B.V.;
VERENIGDE MACHINEFABRIEKEN STORK N.V.,
and DOES 1 through 10, inclusive,
Defendants-Appellants.

D.C. No. CV-88-0475

ORDER

Before: BOOCHEVER, WIGGINS, and NOONAN, Circuit Judges

The memorandum disposition filed on April 30, 1990 is amended as follows:

The last paragraph of the memorandum is deleted. The following is inserted after the first sentence in the second full paragraph on page five:

> Hafnia brought the jurisdictional defect in this case to the attention of Stork's counsel before moving to dismiss the appeal. Even after our opinion was published in *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989) (filed Oct. 2, 1989, amended

Dec. 18, 1989) Stork continued to appeal, needlessly requiring the parties and the court to incur time and effort.

With this amendment, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

No. 88-15708

[FILED APR. 30, 1990
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Plaintiff-Appellee,

v.

VENTILATOREN STORK HENGELO, B.V.;
VERENIGDE MACHINEFABRIEKEN STORK N.V.,
and DOES 1 through 10, inclusive,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of California
Edward D. Price, District Judge, Presiding

Argued and Submitted March 14, 1990
San Francisco, California

D.C. No. CV-88-0475

MEMORANDUM*

Before: BOOCHEVER, WIGGINS, and NOONAN, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appellants Ventilatoren Stork Hengelo B.V. ("Stork") and Verenigde Machinefabrieken Stork N.V. ("Machine") timely appeal the district court's decision that appellee Forsikringsaktieselskabet Hafnia ("Hafnia") is not bound by an arbitration provision in a contract between Stork and a third party. Hafnia seeks attorney's fees for this appeal. We have no jurisdiction and therefore dismiss Stork's appeal and grant Hafnia sanctions.

FACTS AND PROCEEDINGS

Appellant Machine and its wholly owned subsidiary Stork are Dutch corporations. Stork does not do, and has never registered to do, business in California. Stork sold windmill blades to Nordtank A/S, a Danish windmill manufacturer. The contract governing that sale (the "Stork-Nordtank contract") contained an arbitration provision.

Nordtank then sold those windmills to Cannon, a United States developer, for use in California. The contract governing that sale (the "Nordtank-Cannon contract") did not contain an arbitration provision. Cannon was not a signatory to the Stork-Nordtank contract. Cannon does not do, and has never registered to do, business in California. Nordtank and Cannon jointly obtained warranty insurance from appellee Hafnia.

After installation of the windmills, Cannon experienced difficulties with them. Cannon sought recovery from the warranty insurance policy issued by Hafnia. Cannon executed a written assignment to Hafnia of all claims Cannon had against Stork for defective windmill blades.

Hafnia sued Stork in California state court for the defective design and manufacture of the windmill blades. Stork successfully removed to federal court. Stork then

moved to compel Hafnia to arbitrate pursuant to the terms of the Stork-Nordtank contract. At the same time, Hafnia moved to remand the action back to state court for lack of subject matter jurisdiction based on 28 U.S.C. § 1447(c) (1982). The district court granted Hafnia's motion on November 22, 1988.

DISCUSSION

A. APPELLATE JURISDICTION

We have no jurisdiction to review a district court's remand order pursuant to 28 U.S.C. § 1447(d) if the district court remanded because it lacked subject matter jurisdiction. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984). Likewise, we have no jurisdiction to review a district court's conclusions of law related to its determination that it lacks subject matter jurisdiction. *See Hansen v. Blue Cross of California*, No. 88-5910, slip op. at 14471-72 (9th Cir. Dec. 18, 1989). However, we have jurisdiction over a district court's conclusions of law that do not relate to its determination of jurisdiction. *Pelleport*, 741 F.2d at 276.

Stork seeks review of the district court's determination that the Stork-Nordtank arbitration clause does not bind Hafnia, claiming that decision was not related to its determination of matter jurisdiction.[1] We disagree.

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[1]The district court's order states, in pertinent part:

> None of the parties have made any showing that any agreement was ever entered into by the parties to this action to submit the issues raised by the complaint to arbitration.
>
> ...

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 201 *et seq.* provides the only ground for subject matter jurisdiction in this case. For the district court to have had subject matter jurisdiction under the terms of the Convention, the instant proceeding must "[relate] to an arbitration agreement or award . . . under the Convention." 9 U.S.C. § 205.

Unless the Nordtank-Stork arbitration clause is enforceable by Stork against Hafnia, the proceeding could not have related to an arbitration agreement, and the district court would have had no subject matter jurisdiction. Thus, the question of whether the Nordtank-Stork arbitration clause binds Hafnia can in no way be construed as apart from the question of the district court's subject matter jurisdiction. They are in fact the very same question. Once the district court determined that the [sic] Hafnia was not subject to the arbitration clause, the district court could properly have done *nothing but remand.*

This case thus differs from those in which the substantive issue decided by the district court was unrelated to the issue of subject matter jurisdiction. *See, e.g., Clorox v. United States Dist. Court for the N.D. of Cal.,* 779 F.2d 517, 520 (9th Cir. 1985) (district court's decision that Clorox had waived the right to remove was apart from issue of whether district court had jurisdiction and remand order was therefore reviewable); *Pelleport,* 741 F.2d at 276-77 (district court's decision that forum selection clause governed dispute was apart from issue of whether the district court had jurisdiction and remand order was therefore reviewable).

Accordingly, the Court remands the action to the Superior Court for the State of California....

Appellants demonstrate no facts in support of their strained assertion that, in reality, the district court: (1) assumed jurisdiction existed; (2) held that Hafnia and Stork are not bound by the arbitration agreement in response to Stork's motion to compel arbitration; and (3) remanded this case to state court for some non-jurisdictional reason, despite the fact that once it determined conclusion (2) above, it had no jurisdiction to do anything but remand. We have no jurisdiction over this appeal.

B. SANCTIONS

We have discretion to impose attorney's fees and costs as appellate sanctions for frivolous appeals pursuant to Fed. R. App. P. 38. *Kelley v. International Brother of Elec. Workers,* 803 F.2d 516, 519 (9th Cir. 1986). An appeal is frivolous where the result is obvious and the arguments of error are wholly without merit. *See Gattuso v. Pecorella,* 733 F.2d 709, 710 (9th Cir. 1984).

In the instant case, Stork's argument that the district court's finding that Hafnia was not bound by the arbitration agreement was a determination unrelated to the district court's jurisdiction is wholly without merit. We therefore award Hafnia its costs and attorney's fees for this appeal. Hafnia will file appropriate documents supporting the award of costs and fees with this court.

Furthermore, although we do not base our award of sanctions on a conclusion that Stork deliberately intended to mislead us, we are not blind to the fact that Stork only discussed the possibility of a jurisdictional defect in appealing the district court's remand order after Hafnia raised it in their brief. Hafnia brought this jurisdictional defect to the attention of Stork's counsel before moving to dismiss the appeal. Nevertheless Stork continued to appeal, needlessly requiring the parties and the court to incur time and effort.

APPEAL DISMISSED.

No. 88-15708

[FILED APR. 11, 1989
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Forsikringsaktieselskabet Hafnia,
Plaintiff-Appellee,
vs.
VENTILATOREN STORK HENGELO, B.V., et al.,
Defendants-Appellants.

DC# CV-88-0475-EDP
Eastern California
(Fresno)

ORDER

Before: WALLACE, ALARCON and NORRIS, Circuit Judges

On January 6, 1989, appellee filed a motion to dismiss the appeal for lack of jurisdiction. A supplemental memorandum in support of the motion to dismiss was received on January 11, 1989. Appellants filed an opposition to the motion to dismiss on January 18, 1989. Appellants filed a supplemental opposition on February 1, 1989. Appellee's reply in support of the motion to dismiss was received on February 6, 1989. The motion to dismiss the appeal and all related memoranda are referred for disposition to the panel that will consider this appeal on the merits.

CASE NO. CV F-88-475 EDP

[ORIGINAL FILED
JAN. 4, 1989
CLERK, U.S. DIST. COURT
EASTERN DISTRICT OF CALIFORNIA]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FORSIKRINGSAKTIESELSKABET HAFNIA,
Plaintiff,
v.
VENTILATOREN STORK HENGELO, B.V., VERENIGDE MACHINEFABRIEKEN STORK N.V., et al.,
Defendants.

AMENDED MEMORANDUM DECISION RE: PLAINTIFF'S MOTION TO REMAND; DEFENDANTS' MOTION TO DISMISS, OR ALTERNATELY, TO COMPEL ARBITRATION

Defendant Ventilatoren Stork Hengelo, B.V., (hereafter "Stork B.V."), is a corporation organized and existing under the laws of the Netherlands. The principal business of Stork B.V. is the manufacture of fiberglass blades for cooling towers and windmills. Stork B.V. does not do business in California and has never registered or become licensed in California.

Stork B.V. sold some windmill blades to Nordtank, a Danish windmill manufacturer. Nordtank is not a party to this action. Nordtank's factories and offices are located in Denmark. All the other component parts for the Nordtank windmills were purchased from other European manufacturers who likewise are not a party to this action. In the

contract between Stork B.V. and Nordtank, there was an arbitration clause.

Nordtank in turn sold certain windmills to Cannon for installation in California in this court district. Cannon likewise is not a party to this action.

Plaintiff Hafnia is a Danish insurance company which allegedly paid warranty claims pursuant to insurance policies issued to parties not presently before the court.

After Nordtank filed for bankruptcy in Denmark, Cannon made claims against Stork B.V., claiming Cannon was a third-party beneficiary and entitled to the benefit of the warranty provisions in the Stork B.V./Nordtank contract. Because of Cannon's threats and the confusion created by Nordtank's bankruptcy, Stork B.V. initiated an action against Cannon in a Netherlands' court. Although substantial proceedings have been had between Hafnia, Nordtank and Stork B.V. in Europe, Hafnia filed the present action in the Kern County Superior Court. Defendants removed the state court action to this court.

In its petition for removal, counsel for Stork B.V. alleges in pertinent part: "This court has original jurisdiction in this matter, without regard to the amount of controversy, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'Convention'). (9 U.S.C. § 201, *et seq.*)"

9 U.S.C. § 205 provides:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where

> the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title [9 USCS §§ 1 et seq.] any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Since no arbitration award has been entered in this matter, the Court turns its attention as to whether there is a contract that requires the parties before the Court to engage in arbitration.

The transaction that gave rise to this dispute was the condition of the completed windmills purchased by Cannon from Nordtank. However, it is undisputed that Cannon was not a signatory to the Stork B.V./Nordtank supply contract. Further, it is also undisputed that Cannon's purchase agreement with Nordtank does not contain an arbitration clause. Stork B.V.'s only claim to entitlement to the protection of federal court jurisdiction must necessarily arise from the arbitration agreement between Stork B.V. and Nordtank.

Further, counsel seem to be in complete agreement that none of the parties to this action, Hafnia, Stork B.V. or Stork N.V., have ever qualified to do business in California, or in fact have done business in California.

As was stated in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648, 89 L.Ed.2d 648, 655, 106 S.Ct. 1415, (1986), "arbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute which he has not agreed so to submit." None of the

parties have made any showing that any agreement was ever entered into by the parties to this action to submit the issues raised by the complaint to arbitration.

While this Court has serious doubt as to whether the state court had jurisdiction, that matter is technically not before this Court.

Accordingly, the Court remands the action to the Superior Court for the State of California in and for the County of Kern for further proceedings.

DATED: January 3, 1988 [sic].

EDWARD DEAN PRICE
United States District Judge

CASE NO. CV F-88-475 EDP

[ORIGINAL FILED NOV. 22, 1988
CLERK, U.S. DIST. COURT
EASTERN DISTRICT OF CALIFORNIA]

[ENTERED NOV. 22, 1988
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FORSIKRINGSAKTIESELSKABET HAFNIA,
Plaintiff,
v.
VENTILATOREN STORK HENGELO, B.V., VERENIGDE MACHINEFABRIEKEN STORK N.V., et al.,
Defendants.

MEMORANDUM DECISION RE: DEFENDANTS' MOTION TO REMAND, OR ALTERNATELY, TO DISMISS

Defendant Ventilatoren Stork Hengelo, B.V., (hereafter "Stork B.V."), is a corporation organized and existing under the laws of the Netherlands. The principal business of Stork B.V. is the manufacture of fiberglass blades for cooling towers and windmills. Stork B.V. does not do business in California and has never registered or become licensed in California.

Stork B.V. sold some windmill blades to Nordtank, a Danish windmill manufacturer. Nordtank is not a party to this action. Nordtank's factories and offices are located in Denmark. All the other component parts for the Nordtank windmills were purchased from other European manufac-

turers who likewise are not a party to this action. In the contract between Stork B.V. and Nordtank, there was an arbitration clause.

Nordtank in turn sold certain windmills to Cannon for installation in California in this court district. Cannon likewise is not a party to this action.

Plaintiff Hafnia is a Danish insurance company which allegedly provided warranty insurance to parties not presently before the court.

After Nordtank filed for bankruptcy in Denmark, Cannon made claims against Stork B.V., claiming Cannon was a third-party beneficiary and entitled to the benefit of the warranty provisions in the Stork B.V./Nordtank contract. Because of Cannon's threats and the confusion created by Nordtank's bankruptcy, Stork B.V. initiated an action against Cannon in a Netherlands' court. Although substantial proceedings have been had between Hafnia, Nordtank and Stork B.V. in Europe, Hafnia filed the present action in the Kern County Superior Court. Defendants removed the state court action to this court.

In its petition for removal, counsel for Stork B.V. alleges in pertinent part: "This court has original jurisdiction in this matter, without regard to the amount of controversy, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'Convention'). (9 U.S.C. § 201, *et seq.*)"

9 U.S.C. § 205 provides:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for

> the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title [9 USCS §§ 1 et seq.] any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Since no arbitration award has been entered in this matter, the Court turns its attention as to whether there is a contract that requires the parties before the Court to engage in arbitration.

The transaction that gave rise to this dispute was the condition of the windmills purchased by Cannon from Verenigde Machinefabrieken Stork N.V. (hereafter "Stork N.V."). It is undisputed that Cannon was not a signatory to the Stork B.V./Nordtank supply contract, and that further, the Nordtank agreement does not contain an arbitration clause. Hafnia's only claim to entitlement to the protection of federal court jurisdiction must necessarily arise from the arbitration agreement between Stork B.V. and Nordtank.

Further, counsel seem to be in complete agreement that none of the parties to this action, Hafnia, Stork B.V. or Stork N.V., have ever qualified to do business in California, or in fact have done business in California.

As was stated in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648, 89 L.Ed.2d 648, 655, 106 S.Ct. 1415, (1986), "arbitration is a matter of contract and a party cannot be required to submit to arbitration in a

dispute that which he has not agreed so to submit." None of the parties have made any showing that any agreement was ever entered into by the parties to this action to submit the issues raised by the complaint to arbitration.

While this Court has serious doubt as to whether the state court had jurisdiction, that matter is technically not before this Court.

Accordingly, the Court remands the action to the Superior Court for the State of California in and for the County of Kern for further proceedings.

DATED: November 21, 1988.

EDWARD DEAN PRICE
United States District Judge

Federal Rules of Appellate Procedure, Rule 38, Damages for Delay:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

United States Code, Title 9, Section 15, Appeals:

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

United States Code, Title 9, Section 201, Enforcement of Convention:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

United States Code, Title 9, Section 202, Agreement or award falling under the Convention:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

United States Code, Title 9, Section 203, Jurisdiction; amount in controversy:

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States

(including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

United States Code, Title 9, Section 204, Venue:

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

United States Code, Title 9, Section 205, Removal of cases from state courts:

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

United States Code, Title 9, Section 206, Order to compel arbitration; appointment of arbitrators:

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

United States Code, Title 9, Section 207, Award of arbitrators; confirmation; jurisdiction; proceeding:

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

United States Code, Title 9, Section 208, Chapter 1; residual application:

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

United States Code, Title 28, Section 1441, Actions removable generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for

the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

United States Code, Title 28, Section 1447, Procedure after removal generally:

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

No. 90-528

Supreme Court, U.S.
FILED
OCT 18 1990
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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

VENTILATOREN STORK HENGELO B.V.,
VERENIGDE MACHINEFABRIEKEN STORK N.V.,
Petitioners,

VS.

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SANCTIONS

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I.

QUESTIONS PRESENTED FOR REVIEW

Respondent asserts that only the following questions are presented for review:

(1) Whether a remand order for lack of federal court subject matter jurisdiction is reviewable on appeal or otherwise under 28 U.S.C. § 1447(d);

(2) Whether the United States Court of Appeals for the Ninth Circuit abused its discretion in awarding sanctions against Petitioners under Rule 38 of the *Federal Rules of Appellate Procedure* where Petitioner's appeal was frivolous and wholly without merit; and

(3) Whether additional sanctions should be awarded against the Petitioners under Supreme Court Rule 42.2 and 28 U.S.C. § 1912.

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No. 90-528

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

VENTILATOREN STORK HENGELO B.V,
VERENIGDE MACHINEFABRIEKEN STORK N.V.,
Petitioners,

VS.

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aka HAFNIA,
Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SANCTIONS

II.

JURISDICTIONAL STATEMENT

Contrary to Petitioners' claim, this Court lacks jurisdiction. 28 U.S.C. § 1447(d) specifically provides: "An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. . . ."

Additionally, jurisdiction under 28 U.S.C. § 1254(1) is lacking, because the case is not properly one "in the Court of Appeals" inasmuch as the Ninth Circuit Court of Appeals dismissed Petitioners' appeal for lack of appellate court jurisdiction. *See Good Shot v. United States*, 179

U.S. 87, 21 S. Ct. 33, 45 L.Ed. 101 (1900). Petitioners should not be allowed to claim Supreme Court jurisdiction where both the District Court and Ninth Circuit concluded that they lacked jurisdiction.

III.

STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited by Petitioners, Respondnet HAFNIA refers this Court to:

A. Supreme Court Rule 42.2 (formerly Rule 49.2) which states:

> .2. When a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant or applicant, or against the party's attorney or against both.

B. 28 U.S.C. § 1912, titled "Damages and costs on affirmance" which states:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court, in its discretion, may adjudge to the prevailing party just damages for his delay, and single or double costs.

IV.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

Petitioner, VENTILATOREN STORK HENGELO B.V. is a wholly-owned subsidiary of Petitioner VER-

ENIGDE MACHINEFABRIEKEN STORK N.V. (hereinafter collectively referred to as "STORK".) Both are Dutch corporations. STORK designed, manufactured and sold windmill blades to Nordtank A/S, a Danish windmill manufacturer. STORK contends that the supply contracts between these companies (the "Stork-Nordtank contracts") contained an arbitration agreement.[1]

Nordtank sold windmills using STORK blades to the Cannon Capitol Group for use in its California windparks. The sales contract between these parties (the "Nordtank-Cannon contract") did not assign or otherwise obligate Cannon to any of the terms of the Stork-Nordtank contracts nor did it identify Cannon as an intended third-party beneficiary to the contracts. Nordtank and Cannon jointly obtained warranty insurance for the windmills from Respondent FORSIKRINGSAKTIESELSKABET HAFNIA, aka HAFNIA.

After the installation of the windmills, Cannon experienced difficulties with the blades manufactured by STORK. Cannon sought repair or replacement by STORK of the defective blades. STORK responded that it had no contractual obligations to Cannon, because Cannon was not a party to the Stork-Nordtank contracts.

Cannon then made a claim on its warranty insurance with HAFNIA. HAFNIA became subrogated to the rights of Cannon and was given a written assignment by Cannon

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[1]The only evidence produced by Stork to support this is a letter dated April 15, 1986 from Stork's managing director to Nordtank. The signature spaces provided on that letter for Nordtank's acceptance and approval of the arbitration agreement are blank. Consequently, the question remains whether Nordtank agreed in writing to arbitration with Stork as is required by Article II ¶¶ 1 and 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

of all claims it had against STORK for the defective windmill blades.

HAFNIA sued STORK in the California state court asserting four separate causes of action. Under California law, none of the four causes of action requires privity by Cannon in the Stork-Nordtank contracts or relies upon the Stork-Nordtank contracts.

As a result of STORK's legal maneuvering, this lawsuit has now been pending for over two years, focusing exclusively on the issue of federal court subject matter jurisdiction rather than the merits.

B. PROCEDURAL BACKGROUND.

1. District Court.

STORK removed this case from California state court to federal court based on 9 U.S.C. § 205 which provides federal court subject matter jurisdiction over disputes falling within the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. STORK relied exclusively on the alleged arbitration agreement in the Stork-Nordtank contracts to which Cannon/Hafnia was not a party. STORK then filed two motions to dismiss and a motion to compel arbitration pursuant to 9 U.S.C. § 206.

HAFNIA responded with a Motion to Remand for Lack of Federal Subject Matter Jurisdiction pursuant to 28 U.S.C. § 1447(c). Contrary to STORK's representations, only HAFNIA's motion to remand was ever heard and decided by the District Court.[2] It is clear from the District Court's opinion that STORK did not meet its

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[2]Stork repeatedly misrepresented to the Ninth Circuit that the District Court heard and decided its Motion to Compel Arbitration before it decided to remand the case. The Ninth Circuit found that the facts did not support this "strained assertion" on Stork's part.

burden of establishing subject matter jurisdiction by proving that the dispute related to a written arbitration agreement between the parties to the litigation. Consequently, the District Court granted the motion and remanded the case.

2. Court of Appeals.

STORK appealed the District Court's remand order to the Ninth Circuit Court of Appeals. HAFNIA's counsel contacted STORK's counsel to point out that the remand order could not be reviewed on appeal under 28 U.S.C. § 1447(d) and requested that the appeal be voluntarily dismissed. STORK refused to withdraw its appeal.

STORK attempted to have its appeal consolidated with another appeal.[3] HAFNIA opposed consolidation because of the substantial differences between the cases and the issues on appeal.[4] STORK's Motion to Consolidate the Appeals was denied.

To avoid further delay and unnecessary expense, HAFNIA filed a Motion to Dismiss the Appeal and For Award of Sanctions based on a lack of appellate court jurisdiction under 28 U.S.C. § 1447(d). The Motions Panel of the Ninth Circuit did not decide the motion and, instead, referred it to the panel hearing the appeal on its merits. This panel granted HAFNIA's motion to dismiss

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See Memorandum, United States Court of Appeals for the Ninth Circuit, filed April 30, 1990, in Petitioners' Appendix at p. 7a.

[3]*Difwind Farms Ltd. VIII, et. al. v. Ventilatoren Stork Hengelo B.V.*, United States District Court for the Central District of California, Case No. CV 88-5038 MRP, *appeal dismissed*, United States Court of Appeals for the Ninth Circuit, No. 89-55145, June 14, 1989.

[4]The *Difwind v. Stork* case was originally filed in federal court based on diversity jurisdiction. Consequently, subject matter jurisdiction was never an issue as it was in this case.

the appeal. In addition, this panel concluded that STORK's appeal was frivolous and "wholly without merit", and awarded HAFNIA its costs and attorney's fees in opposing the appeal.

STORK filed a Petition for Rehearing, suggesting a hearing *en banc*. This petition was denied.

By Order dated October 9, 1990, the Ninth Circuit fixed the sanctions award at $28,478.75 based on HAFNIA's unopposed application.

V.

REASONS WHY THE PETITION SHOULD BE DENIED

A. SUMMARY OF ARGUMENT.

STORK characterizes the case as one involving arbitration. It is, instead, a case involving the appealability of a remand order based on lack of subject matter jurisdiction. When the issue is framed properly, it is apparent that: (1) the Ninth Circuit's dismissal of STORK's appeal was a matter of black letter law; (2) this case does not fall within any exception to the black letter law; (3) Petitioner's arguments on arbitration are not relevant; and (4) the Ninth Circuit's award of sanctions under F.R.A.P. 38 was proper and reasonable.

HAFNIA also requests that this Court consider an additional award of sanctions against petitioner STORK under Supreme Court Rule 42.2 and 28 U.S.C. § 1912 under the circumstances of this case.

B. THE NINTH CIRCUIT'S RULING IS A MATTER OF BLACK LETTER LAW.

The issue raised by Petitioner STORK is nothing new, novel or controversial. Instead, it is a matter of black letter law set out by statute and case law.

28 U.S.C. § 1447(c) provides:

> (c) If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

When a motion for remand is brought pursuant to this statute, the burden of proving the existence of subject matter jurisdiction is on the party claiming that jurisdiction. *Jones v. General Tire,* 541 F.2d 660 (7th Cir. 1976); *Nesbitt v. Blazer Financial,* 550 F. Supp. 819 (N.D. Cal. 1982).

Doubts as to the existence of federal court subject matter jurisdiction are resolved *against* such jurisdiction; statutes conferring jurisdiction are strictly construed *against* jurisdiction; and removal statutes are strictly construed *against* removal and in favor of remand. *Wilson v. Republic Iron and Steel Co.,* 257 U.S. 92, 97, 66 L.Ed. 144, 42 S. Ct. 35, 37 (1921); *Emrick v. Touche Ross and Co.,* 846 F.2d 1190, 1195 (9th Cir. 1988); *Sullivan v. First Affiliated Securities, Inc.,* 813 F.2d 1368, 1371 (9th Cir. 1987); *Heatherton v. Playboy Inc.,* 60 F.R.D. 372 (D.C. Cal. 1973).

In the case at hand, Respondent HAFNIA moved for remand citing 28 U.S.C. § 1447(c). The District court was not convinced that STORK had met its burden of estab-

lishing federal court subject matter jurisdiction and, therefore, remanded the case.

> "None of the parties have made any showing that any agreement was ever entered into by the parties to this action to submit the issues raised by the complaint to arbitration." *See* the District Court's Amended Memorandum Decision in Petitioner's Appendix at P. 12A-13A.[5]

When a case is remanded pursuant to 28 U.S.C. § 1447(c), that decision is not reviewable by appeal or by writ. 28 U.S.C. § 1447(d) specifically states:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . .[6]

The language of 28 U.S.C. § 1447(d) is clear, precise and unambiguous. As this Court has stated:

> It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessors stretching back to 1887. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343, 46 L.Ed. 2d 542, 549, 96 S. Ct. 584, 589 (1976).

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[5]While the District Court did not specifically cite 28 U.S.C. § 1447(c) in its Memorandum Decision or Amended Memorandum Decision, this is not necessary to preclude appeal. *See Schmill v. Insurance Company of North America*, 845 F.2d 1546, 1549-50 (9th Cir. 1988); *Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987).

[6]28 U.S.C. § 1447(d) exempts civil rights cases brought under 28 U.S.C. § 1443. This exception is not applicable here.

This black letter law has been repeated many times by many courts. *Volvo Corporation of America v. Schwarzer*, 429 U.S. 1331, 1332-3, 50 L.Ed. 2d 273, 275, 97 S. Ct. 284 (1976); *Hansen v. Blue Cross of California*, 891 F.2d 1384, 1387-8 (9th Cir. 1989); *Schmitt v. Insurance Company of North America*, 845 F.2d 1546, 1549 (9th Cir. 1988); *Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987).

This black letter law was specifically cited to STORK by HAFNIA with a request that its appeal be voluntarily dismissed. This black letter law was cited by the Ninth Circuit in its decision dismissing STORK's appeal and awarding sanctions.

This black letter law, as it applies to this case, does not need to be addressed again by this Court.

C. THIS CASE DOES NOT FALL WITHIN ANY EXCEPTION TO THE BLACK LETTER LAW.

An exception to the black letter law discussed above has been recognized where remand is based on a decision of "substantive law apart from any jurisdictional decision." *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 276 (9th Cir. 1984). *See also Thermtron Products v. Hermansdorfer*, 423 U.S. 336, 46 L.Ed. 2d 542, 96 S. Ct. 584 (1976); *Hansen v. Blue Cross of California*, 891 F.2d 1384, 1387-8 (9th Cir. 1989); *Schmitt v. Insurance Company of North America*, 845 F.2d 1546, 1550-1551 (1988); *Scott v. Machinist's Automotive Trades District Lodge No. 190 of Northern California*, 827 F.2d 589, 592 (9th Cir. 1987); *Kunzi v. Pan American World Airways, Inc.*, 833 F.2d 1291, 1293 (9th Cir. 1987); and *Clorox v. U.S. District Court for the Northern District of California*, 779 F.2d 517, 520 (9th Cir. 1985).

The case of *Pelleport Investors v. Budco* provides the best and clearest example of the distinction between a case remanded for lack of subject matter jurisdiction which is not appealable and a case remanded on other grounds which may be appealable.[7]

In *Pelleport*, the Ninth Circuit noted that there were two alternative theories upon which the District Court could have remanded the case: (1) diversity jurisdiction was lacking; or (2) by contract, the parties had agreed to litigate in a forum other than the U.S. District Court. The Ninth Circuit noted:

> Had the District Court based its remand order on the first theory, § 1447(d) would no doubt apply, because, even if clearly erroneous, a District Court's decision that it lacks subject matter jurisdiction to hear a case is not reviewable. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343, 96 S.Ct. 584, 589, 46 L.Ed. 2d 542 (1976). But the Court did not base its remand order on lack of subject matter jurisdiction. It relied instead upon the forum selection clause. The novel question before this Court, then, is whether a remand order based on the enforceability of such a clause is reviewable. We believe it is. *Pelleport v. Budco*, 741 F.2d at 276.

In the case at hand, the question of whether or not the case related to a written arbitration agreement between the parties and the question of subject matter jurisdiction were and are one and the same.

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[7]A remand order based on grounds other than a lack of subject matter jurisdiction is not automatically appealable. Depending upon the nature of the order, it may be reviewable on appeal, it may be reviewable only by extraordinary writ or may not be reviewable at all.

This is not a case in which the District Court had subject matter jurisdiction but chose not to exercise it because of other considerations such as a forum selection clause between the parties,[8] nor is this a case in which the court, through the exercise of its subject matter jurisdiction, destroyed that jurisdiction.[9] As a result, this case does not fit within the exception to the rule cited by STORK. Instead, it is the paradigm case for the application of 28 U.S.C. § 1447(d).

D. PETITIONERS' ARGUMENTS CONCERNING ARBITRATION ARE NOT RELEVANT.

As it did in its Ninth Circuit appeal, STORK attempts to have this Court look beyond the issues of subject matter jurisdiction and appellate jurisdiction to focus on its Motion to Compel Arbitration. However, this motion was never heard or decided by the District Court or Ninth Circuit and, therefore, is not properly before this Court. Nevertheless, HAFNIA feels compelled to briefly respond to some of the arguments raised in STORK's Petition.

1. 9 U.S.C. § 15 Does Not Apply.

STORK argues that the Ninth Circuit's dismissal of its appeal conflicts with 9 U.S.C. § 15. However, on its face that statute is limited to the appeal of "an order ... denying an application under § 206 of this Title to compel arbitration." In this case, the District Court neither heard nor decided STORK's Motion to Compel Arbitration

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[8] *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 46 L.Ed. 2d 542, 96 S. Ct. (1976); *Clorox v. U.S. District Court*, 779 F.2d 517 (9th Cir. 1985); *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273 (9th Cir. 1984).

[9] *Waco v. United States Fidelity & Guaranty Company*, 239 U.S. 140, 55 S. Ct. 6, 79 L.Ed. 244 (1935).

under 9 U.S.C. § 206. Consequently, there is no order from which STORK may appeal.

2. 9 U.S.C. § 15 Does Not Conflict with 28 U.S.C. § 1447.

STORK asserts that 9 U.S.C. § 206 should take precedence over 28 U.S.C. § 1447 on the ground that it is more specific. However, this rule of statutory construction does not apply unless the statutes in question conflict. No conflict exists here.

9 U.S.C. § 15 allows for the appeal of an order denying a motion to compel arbitration and 28 U.S.C. § 1447(d) prohibits an appeal of an order remanding a case for lack of subject matter jurisdiction. In this case, the District Court issued an order remanding the case; it did not issue an order denying STORK's Motion to Compel Arbitration. The application of the statutes is, therefore, clear and not in conflict.[10]

3. The Lower Court's Rulings Do Not Conflict With the Public Policy Favoring Arbitration.

STORK insists that the District Court's and the Ninth Circuit's rulings are in conflict with the public policy favoring arbitration enunciated by Congress and by this Court. STORK ignores fundamental principles of arbitration law.

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute which he has not agreed so to submit. *AT&T Technolo-*

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[10]STORK also implies that since 9 U.S.C. § 15 was just enacted on November 19, 1988, it should take precedence. STORK ignores the fact that 28 U.S.C. § 1447(c) was amended by the same Act on the same day.

gies v. Communications Workers, 476 U.S. 643, 648, 89 L.Ed. 2d 648, 655, 106 S. Ct. 1415 (1986).

> A mere assertion that there is a dispute that is arbitrable does not make one exist. *Rosenthal v. Emmanuelle Deetjen & Company*, 516 F.2d 325, 327 (2nd Cir. 1975).

STORK had the opportunity in opposing the remand motion to: (1) establish the existence of an arbitration agreement; and (2) establish that HAFNIA was contractually bound by it. STORK failed on both counts. As a result, the public policy favoring arbitration does not apply here.

E. THE NINTH CIRCUIT'S AWARD OF SANCTIONS WAS REASONABLE AND PROPER.

Under F.R.A.P. 38, the Ninth Circuit Court of Appeals had discretion to award sanctions against STORK if its appeal was frivolous. An appeal is deemed frivolous where "the result is obvious and the arguments of error are wholly without merit." *FDIC v. Van Lannen*, 769 F.2d 666, 667 (10th Cir. 1985); *Gattuso v. Pecorella*, 733 F.2d 709, 710 (9th Cir. 1984); *NLRB v. Catalina Yachts*, 679 F.2d 180, 182 (9th Cir. 1982).

The clarity and unambiguous nature of statutory law and prior case law can serve as evidence that an appeal contradicting that law is frivolous and that sanctions are appropriate. *Kelly v. International Brotherhood of Electrical Workers*, 803 F.2d 516, 519 (9th Cir. 1986).

Given that sanctions under F.R.A.P. 38 are a matter of discretion, an "abuse of discretion" standard should apply. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ____, 110 L.Ed. 2d 395, 110 S. Ct. 2447 (1990). Under such a standard, the award of sanctions by the Ninth Circuit

should be upheld for a number of reasons. First, the appeal was dismissed rather than being decided on its merits, evidencing the clear and unambiguous nature of the law. Second, the lack of appellate court jurisdiction was specifically made known to STORK at the outset of the appeal. Nevertheless, STORK persisted "needlessly requiring the parties and the court to incur time and effort." *See* Petitioner's Appendix at P. 2A. Third, the Ninth Circuit concluded that STORK's arguments on appeal were "strained", not supported by the facts and "wholly without merit." *See* Petitioner's Appendix at P. 7A. Fourth, the Ninth Circuit Panel's Decision was unanimous. Fifth, with the exception of an amendment to and a deletion in the wording of the sanctions portion of the opinion, that award was affirmed and upheld following STORK's request for a rehearing and suggestion for a rehearing *en banc*. Sixth, while STORK argues that only one of its arguments was deemed meritless, that one argument went to the very heart of the entire appeal: whether the Appellate Court had jurisdiction or not.

STORK argues that the award of sanctions under F.R.A.P. Rule 38 will discourage access to the appellate process. Indeed, the intent of this rule as well as 28 U.S.C. § 1912, this court's Rule 42.2 (formerly 49.2) and F.R.C.P. Rule 11 is to discourage meritless and frivolous pleadings which delay the resolution of cases on their merits while costing opposing parties and the courts considerable time and money. They do not discourage nor do they apply to cases with some merit even if those cases are ultimately lost.

Unfortunately, the clear language of 28 U.S.C. § 1447(d) and this court's prior decisions on point did not discourage STORK from filing its appeal; the threat of Rule 38 sanctions did not discourage STORK from

filing its frivolous appeal; and the current threat of additional sanctions under Supreme Court Rule 42.2 has not discouraged STORK from filing this frivolous Petition for Writ of Certiorari. Unfortunately, STORK has had too much access to the courts.

VI.

REASONS WHY ADDITIONAL SANCTIONS SHOULD BE AWARDED UNDER SUPREME COURT RULE 42.2 AND 28 U.S.C. § 1912

> There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, *United States v. Rice,* 327 U.S., at 751, 90 L.Ed. 982, 66 S. Ct. 835, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court. *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 351, 46 L.Ed. 2d 542, 554, 96 S. Ct. 584 (1976).

By filing its appeal with the Ninth Circuit and by seeking a Petition for Writ of Certiorari from this Court, STORK has violated the clear language, purpose and intent of 28 U.S.C. § 1447(d). STORK has delayed the litigation of this case on its merits for over two years by arguing and appealing the question of subject matter juridiction. Even if its Petition to this Court is denied, STORK has accomplished that which 28 U.S.C. § 1447(d) was intended to prevent.

Unless this Court awards additional sanctions under Rule 42.2 and/or 28 U.S.C. § 1912, Respondent HAFNIA will return to the California state court where this case

was initiated with nothing to show but legal bills and a two year delay.

Many years ago, this Court recognized the importance of using sanctions as a tool to discourage frivolous appeals.

> Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter, more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked. *Whitney v. Cook*, 99 U.S. 607, 25 L.Ed. 446 (1878).

This quote rings true in this case, and HAFNIA submits that this Court should award against STORK the attorney's fees and costs incurred by HAFNIA in opposing this Petition for Writ of Certiorari.

VIII.

CONCLUSION

STORK's Petition for Writ of Certiorari should be seen for what it really is: an improper attempt to seek review of a remand order in violation of 28 U.S.C. § 1447(d). To deter similar conduct by STORK and its counsel in the future and to compensate HAFNIA for the delay and expenses the Appeal and this Petition have caused, HAFNIA requests that this Court affirm the Ninth Circuit Court of Appeal's award of sanctions under F.R.A.P. Rule 38 and that it award additional sanctions under Supreme Court Rule 42.2 and 28 U.S.C. § 1912.

Dated: October 18, 1990

Respectfully submitted,

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APPENDIX A

FILED OCTOBER 9, 1990
CLERK, U.S. COURT OF APPEALS

No. 88-15708

United States Court of Appeals

For the Ninth Circuit

FORSIKRINGSAKTIESELSKABET HAFNIA,
Plaintiff-Appellee,

vs.

VENTILATOREN STORK HENGELO B.V, ET AL.,
Defendants-Appellants.

DC #CV-88-0475-EDP
Eastern California (Sacramento)

ORDER

Appellee's unopposed application for attorneys' fees is granted. Fees are awarded in the amount of $28,478.75.

For the Court:

Chris Goelz
Motions Attorney/Deputy Clerk

Supreme Court, U.S.
FILED
NOV 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-528

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

VENTILATOREN STORK HENGELO B.V. AND VERENIGDE MACHINEFABRIEKEN STORK N.V.,
Petitioners,

VS.

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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VS.

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, Ventilatoren Stork Hengelo B.V. ("Ventilatoren") and Verenigde Machinefabrieken Stork N.V. ("Machinefabrieken"), filed a Petition for Writ of Certiorari on September 24, 1990.[1] In response, Respondent, Forsikringsaktieselskabet Hafnia ("Hafnia") filed a document entitled Brief in Opposition to Petition for Writ of Certiorari and Request for Sanctions ("Op. Cert."). In its Opposition Brief, Hafnia does not challenge the basic grounds which support issuance of a writ including (1) the important federal policies favoring the right to

[1]The Petition included a list of the nonwholly-owned subsidiaries of petitioners as required by Supreme Court Rule 29.1.

arbitration — especially the right to arbitration in international commercial transactions, and (2) the fundamental right to seek access to the judicial process which includes the right to seek appellate review. Rather than addressing the merits of the Petition, Hafnia makes several assertions and arguments which attempt to confuse the questions raised by petitioners. This Reply Brief will address the errors and misstatements which are contained in Hafnia's Opposition Brief.

JURISDICTIONAL STATEMENT

Hafnia has claimed that the Court does not have jurisdiction to hear this appeal, citing *Good Shot v. United States*, 179 U.S. 87, 21 S.Ct. 33, 45 L.Ed. 101 (1900), for the proposition that jurisdiction is lacking because the case was not "in the Court of Appeals". (Op. Cert. at 1.) This argument is without merit. *Good Shot* does not establish that any decision by the court of appeals holding that the federal courts lack jurisdiction over an issue is beyond the certiorari authority of the Court. The correct rule is that the Court's certiorari jurisdiction is plenary, and that, so long as an appeal is "timely filed and all other procedural requirements" are met, the Court has jurisdiction to review the case. *United States v. Nixon,* 418 U.S. 683, 690, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). As the Court has explained:

> "There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction — a power we have exercised routinely. If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." (citation omitted)

Nixon v. Fitzgerald, 457 U.S. 731, 743 n. 23, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

STATEMENT OF THE CASE

Hafnia has agreed with most of the key facts in the Petition. However, in its Opposition Brief, Hafnia made the statement that none of its four causes of action rely upon the contract that contained the arbitration clause. (Op. Cert. at 4.) Hafnia's statement is not true. The central allegation to all four causes of action is that the windmill blades were defectively designed and manufactured. In its complaint, Hafnia has admitted that the windmill blades were "designed and manufactured pursuant to [Ventilatoren's] contract with Nordtank". Ventilatoren's contract with Nordtank, of course, contained the arbitration clause at issue in the present case. In addition, Hafnia's express warranty cause of action specifically refers to the five-year warranty contained in the supply contract. Contrary to Hafnia's argument, arbitration clauses are routinely enforced against parties, such as Hafnia, which are proceeding as assignees or subrogees.[2]

---

[2]As one court explained:

> "[T]here is no valid basis in law or equity why an arbitration clause should not be enforced against a subrogee. To hold otherwise would seriously impair the validity of arbitration clauses since either party could escape the effect of such a clause once he has settled with his insurer."

Lumbermens Mutual Casualty Co. v. Borden Co., 268 F.Supp. 303, 314 (S.D.N.Y. 1967). *See Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp.*, 677 F.2d 771, 773 (9th Cir. 1982) (component part manufacturer "had no greater liabilities" and purchaser "had no greater rights" than those specified in supply contract); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 204 (3d Cir. 1983), *cert.*

In the Petition, Ventilatoren and Machinefabrieken pointed out that, in a virtually identical case, the same arbitration agreement was held binding against parties who were in the same basic position as Hafnia. Hafnia has attempted to differentiate its lawsuit from this other case by claiming that Ventilatoren's motion to consolidate the two appeals "was denied". (Op. Cert. at 5.) Hafnia fails to mention that the Ninth Circuit saw sufficient similarity between the two cases to enter an order requiring that the two appeals be calendared and heard by the same three-judge panel.[3] Moreover, it is disingenuous for Hafnia to argue that there are "substantial differences between the cases and issues on appeal" (Op. Cert. at 5), when Hafnia knows that both cases arise from Nordtank's purchase of windmill blades from Ventilatoren and that both cases are covered by the exact same arbitration clause.[4]

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denied, 464 U.S. 938 (1983) (purchaser from manufacturer was bound by forum selection clause in the component part manufacturer's supply contract with the manufacturer); *Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F.Supp. 579, 581 (N.D. Cal. 1985) (arbitration clause in component part manufacturer's contract was recognized).

[3]The order filed by the Ninth Circuit Court of Appeals on March 9, 1989, provided that:

> "Appellants' motion to consolidate appeal Nos. 88-15708 and 89-55145 is denied. However the clerk shall calendar these cases before the same panel.
>
> This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order."

Hafnia never sought reconsideration of the order calendaring the two cases together.

[4]Hafnia has also suggested that Nordtank may not have signed the agreement with the arbitration clause. (Op. Cert. at 3 n.1.) In the district court, Hafnia conceded that Nordtank was bound by the

REASONS FOR GRANTING THE WRIT

I.

A WRIT SHOULD BE ISSUED TO PERMIT THE APPEAL OF THE DISTRICT COURT'S DECISION ON THE ARBITRATION QUESTION

While Hafnia attempts to confuse the questions raised by the Petition, it does admit the crucial issue which supports the need for issuance of a writ of certiorari. Hafnia has conceded that the district court did decide that Hafnia was not bound by the arbitration agreement.[5] That question should be subject to appellate review. It should not make any difference whether the issue is decided in the context of a remand when there is a pending motion to compel arbitration. A party who has been denied the right to arbitration should be able to seek appellate review of the adverse ruling. Moreover, a party should not be penalized under Fed. R. App. P. 38 for attempting to seek appellate review.

Hafnia has argued that the Ninth Circuit's ruling was a matter of black letter law. (Op. Cert. at 7-9.) That is not true. No statutes or cases directly support the result

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arbitration clause. As a result, there was no need to introduce Nordtank's signed acknowledgement in the district court.

[5]Hafnia made the following statement in its Opposition Brief:

> "Stork had the opportunity in opposing the remand motion to: (1) establish the existence of an arbitration agreement; and (2) establish that Hafnia was contractually bound by it. Stork failed on both counts."

(Op. Cert. at 13.) *See also* Op. Cert. at 4-5 ("[i]t is clear from the District Court's opinion that Stork did not meet its burden of establishing subject matter jurisdiction by proving that the dispute related to a written arbitration agreement between the parties to the litigation").

which was reached by the Ninth Circuit. Hafnia has not identified any cases which have held that the appealability bar of 28 U.S.C. § 1447(d) applies where the district court first determines the substantive issue that a party is not bound by an arbitration clause in a case which has been removed to federal court pursuant to Section 205 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Hafnia has not identified any cases which have held that the 28 U.S.C. § 1447(d) appealability bar applies where the effect of the district court's remand order was to deny an application to compel arbitration, the appealability of which is authorized by 9 U.S.C. § 15. Nor has Hafnia identified any cases which have held that the 28 U.S.C. § 1447(d) appealability bar applies where the district court's remand decision was "in logic and in fact" preceded by its substantive determination of the arbitration issue, which should have brought the matter within the rule of *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934). As was discussed in the Petition, each of these arguments supports the need for issuance of the writ.

Hafnia has attempted to create the misimpression that the district court's subject matter jurisdiction was dependent upon Ventilatoren's ability to prove that Hafnia had specifically agreed to a written arbitration agreement.[6] Hafnia's suggestion misstates the law. The Convention on

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[6]*See* Op. Cert. at 4-5 ("[i]t is clear from the District Court's opinion that Stork did not meet its burden of establishing subject matter jurisdiction by proving that the dispute related to a written arbitration agreement between parties to the litigation"); Op. Cert. at 12 ("[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute which he has not agreed so to submit").

the Recognition and Enforcement of Foreign Arbitral Awards provides that removal to federal court is proper "[w]here the subject matter of an action or proceeding pending in State court *relates to an arbitration agreement* or award falling under the Convention. . . ." 9 U.S.C. § 205 (emphasis added).[7] In the present case, Hafnia has not and cannot dispute the fact that its lawsuit is related to the arbitration agreement in Ventilatoren's supply contract for the windmill blades.

The fact that the district court ignored the jurisdictional test (i.e., whether the subject matter of a dispute *relates* to an arbitration agreement) and made the substantive determination that Hafnia was not bound by the arbitration clause supports the need for appellate review.[8]

---

[7]Jurisdiction under the Convention for the Recognition and Enforcement of Foreign Arbitral Awards is not dependent upon a finding that both parties agreed to be bound by an arbitration clause. According to 9 U.S.C. § 202, "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention." And, pursuant to 9 U.S.C. § 203: "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."

[8]Under *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 143, 55 S.Ct. 6, 79 L.Ed. 244 (1934), where a substantive determination "in logic and in fact . . . precede[s] that of remand", the order is reviewable. *See also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984) (remand order was appealable, since "[t]o hold otherwise would deprive Budco of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions from review").

This is particularly true where, as with 9 U.S.C. § 15, Congress has expressly and specifically authorized appellate review of any order which denies an application to compel arbitration.

II.

A WRIT SHOULD BE ISSUED BECAUSE THE RULE 38 AWARD WILL DISCOURAGE ACCESS TO THE APPELLATE PROCESS

Contrary to Hafnia's arguments (Op. Cert. at 13-15), there was no basis for the award of sanctions: (1) the law was not clear and unambiguous; (2) one panel of the Ninth Circuit found sufficient merit to the jurisdictional arguments that it refused to decide Hafnia's motion to dismiss and referred the question to the panel which considered the case on the merits; (3) the panel which heard the appeal proceeded with oral argument rather than cancelling it pursuant to Fed. R. App. P. 34(a); and (4) the panel which awarded sanctions refused to address several of the arguments that supported appellate jurisdiction (e.g., the arguments based on 9 U.S.C. § 15, *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934), and the federal policies favoring arbitration).

In its Opposition Brief, Hafnia has made another request for sanctions. (Op. Cert. at 15-16.) Hafnia argues that petitioners should be punished for attempting to protect their right to arbitration by filing a Petition for Writ of Certiorari. Because the Court has jurisdiction to hear this Petition, and because there are substantial reasons why the writ should be issued, the request for sanctions is insupportable. Hafnia's request for sanctions further illustrates the need to grant certiorari in the present case. Sanctions, and requests for them, should

not be used to chill or discourage access to the courts or the appellate process. The present case raises important questions relating to the important federal right to arbitration, a right that has been secured and reaffirmed by statute (9 U.S.C. § 1, *et seq.*), numerous decisions of this Court, and the Convention (9 U.S.C. § 201, *et seq.*) which has been adopted in this country as well as Denmark and The Netherlands. The Court should reject Hafnia's position advocating punishment of legitimate efforts to obtain appellate review.

CONCLUSION

A writ of certiorari should be issued to address the important question of whether the 28 U.S.C. § 1447(d) bar on the appellate consideration of remand orders is applicable where: (1) the district court first determines the substantive issue of whether the parties are bound by an arbitration agreement in a case which was removed under 9 U.S.C. § 205; (2) the effect of the district court's order was to deny an application to compel arbitration, the appealability of which is expressly authorized by 9 U.S.C. § 15; (3) the district court's decision directing remand was preceded "in logic and in fact" by its determination of the arbitrability of the controversy; (4) the district court's decision is inconsistent with this Court's interpretation of the important federal policies favoring the right to arbitration — especially the right to arbitration in international commercial transactions; and (5) several courts of appeals have recognized an exception to 28 U.S.C. § 1447(d) in cases involving forum selection clauses. In addition, a writ of certiorari should be issued to address the important question of whether Fed. R. App. P. 38 sanctions should be used by the courts of appeals to discourage litigants from seeking appellate

review of district court orders which effectively deny the right to arbitration.

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DATED: November 2, 1990.